Office - Supreme Court, U.S.
FILED
OCT 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-344

IN THE

Supreme Court of the United States

October Term, 1984

DARLENE YOUNGS,

Petitioner,

vs.

BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent,

and

CHARLES and MARGARET PETTIBONE,

Intervenors.

Brief in Opposition to Petition for a Writ of Certiorari to the New York State Court of Appeals

---

JOHN E. MURRAY
Attorney for Respondent
Department of Law
Broome County Office Bldg.
Government Plaza
Binghamton, NY 13901
(607) 772-21[illegible]

(THOMAS B. OAKES on the brief
Admitted to practice in
Court of Appeals, highest
New York State court.)

BEST AVAILABLE COPY

34pp

QUESTION PRESENTED

In a proceeding in which the natural parent's unfitness was proved by clear and convincing evidence, in which her parental rights were permanently terminated, and in which the parent did not raise her alleged issue of due process in the state rehearing and appellate courts: whether the termination of her rights would deprive her of due process, and whether the petition presents a special or important reason, an important question of federal law, calling for this Court's exercise of a review on writ of certiorari or in fact seeks only further review of weight of evidence.

TABLE OF CONTENTS

	Page
Question presented	i
Table of authorities	iii
Statement of the case	1
Argument against the allowance of a writ of certiorari . . .	9
1. This case does not present a question of federal law. . . .	9
2. The alleged question was not raised below. . .	11
3. The proof of unfitness was clear and convincing, the case was rightly decided, there are no special or important reasons for review, and in fact only an additional evidentiary review is being sought.	12
Conclusion.	29

TABLE OF AUTHORITIES

Page

CASES:

Santosky v. Kramer, 455 U.S. 745 (1982) 1,10

Matter of Michael B., 58 NY 2d 71 (1983) 10

96 AD 2d 961 (1983) 3

RULES:

United States Supreme Court

Rule 17. 28

Rule 17.1 9,10

Rule 21.1(h) 11

STATEMENT OF THE CASE

The New York State Court of Appeals determined that the weight of the evidence comported with the findings of the Appellate Division and was clear and convincing that the petitioner (Michael Youngs' mother) had permanently neglected Michael and that the petitioner's parental rights to Michael should be terminated.

The appeals to the Appellate Division and to the Court of Appeals followed a rehearing by Family Court of the respondent's permanent neglect petition, after the Court of Appeals had returned the case to Family Court for rehearing in which the respondent would have the opportunity to present evidence with the awareness of the clear and convincing proof standard of Santosky v.

Kramer, 455 U.S. 745(1982), (decided after the initial Family Court determination).

At the rehearing and in the appeals before the Appellate Division and the Court of Appeals from the Family Court decision in the rehearing, the petitioner did not raise the alleged federal question sought to be reviewed. The petitioner's arguments below were evidentiary. She did not raise the alleged issue that she was deprived of due process because of alleged absence of factual showing of unfitness.

After the rehearing was held, the Appellate Division of the New York Supreme Court, with the authority to determine the case on the facts, reversed the Family Court's decision (made with no findings of fact) after the rehear-

ing, and found, based on evidence, that the proof was clear and convincing:

> "It is obvious that despite respondent's failure to advise the department of her whereabouts, petitioner, by its own diligent efforts, located her and made attempts to re-establish the relationship between respondent and her son. We find, too, that respondent failed substantially and continuously to plan for the future of her child. Though her sporadic visits and phone calls to petitioner indicated a wish to reclaim her son, she failed to take steps to set up an adequate home for him and to make any realistic plans to regain custody. Her testimony as to having saved money to set up an apartment for her child was totally discredited by her subsequent actions of moving in with a friend, then into her boyfriend's mother's home, and finally into a one-bedroom apartment with the boyfriend and her daughter. Her dalliances, meager work record, exaggerations as to her illness and failure to seek counseling all indicate by clear and convincing evidence that her child is permanently neglected (Matter of Kimberly Marie DD., 93 AD 2d 919). Respondent has failed to accept the parental role. Her unwillingness to substantially plan for her child's future in any meaningful way supports such a finding."
>
> Matter of Michael B., 96 AD2d 961 (1983).

That opinion of the Appellate Division(as set forth at page 1b of Appendix B of the petition for a writ) accurately sets forth the clear and convincing proof of the chronology of the petitioner's nine-month out-of-state desertion of her son from January 1980 until October 1980 as she trailed several men among three states, and the periods before and after that in which she stayed away from her son and did not visit him even though she lived within a bus ride and, later, a short walk of the foster home where he lived. That opinion also accurately set forth the clear and convincing proof of the respondent's diligent searches for the petitioner as well as diligent efforts to help her throughout the thirteen months of foster care from October 1979 until December 1980.

The Appellate Division recognized that at the rehearing the respondent produced several new witnesses, who testified to new information and whose testimony contradicted the petitioner's testimony in several important areas.

The petitioner did not take the stand to testify in the rehearing, nor did she offer any other evidence than the transcript of her testimony from the first hearing. She offered nothing new to counter the respondent's new evidence.

The respondent's new evidence included a person with whom the petitioner had stayed, the man with whom petitioner left for Texas and with whom she was staying when the permanent neglect proceeding began in December 1980, and the landlord's agent of the building where

the petitioner stayed after she returned from her nine-month absence. New evidence showed, among other things:

That the petitioner left for Texas because she was in love with her boyfriend, with whom she left; not out of any fear;

That when the petitioner was not staying with her own mother, Michael's grandmother, the petitioner did not visit Michael. The only exception was a visit when the grandmother was the one who picked Michael up and returned him. (There were only five visits in thirteen months, as previously proved);

That when she was moving in or staying with friends before and after her nine-month absence from New York State, she did not visit Michael even though she was staying either within a walk or a short bus ride from his foster home,

That the petitioner had testified inaccurately when she said she had used $600 savings to rent an apartment, allegedly establishing a home for Michael, when she returned to Binghamton; she having instead been shown not to have been a rent-paying tenant before the permanent neglect petition was filed;

That in Texas she did live and sleep with her boyfriend three months (with her young daughter sleeping in the same enclosure), contrary to her testimony in the first hearing;

That after Texas, she lived with another man in West Virginia, also contrary to her testimony,

That in November 1980 she did not once ask to visit Michael,

That after her return to Binghamton, New York, she persisted in her determination not to have a psychiatric evaluation, and she made no effort to keep her job.

The Court of Appeals determined that the evidence comported with the Appellate Division's findings and was clear and convincing.

ARGUMENT AGAINST THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. A writ of certiorari should not be allowed, because the petition for a writ of certiorari does not present a question of federal law. United States Supreme Court Rule 17.1. It seeks in fact only a review to weigh the evidence. This is the effect of the petition's argument at page 20 that the case allegedly "was simply wrongly decided." The respondent submits that this presents no federal question. The respondent submits that the permanent neglect of the child was so clearly and convincingly proved as to present a compelling case, so that the case emphatically was rightly decided; but that the factual issue of the weighing of the evidence does not

present a federal question for this Court's review. Unites States Supreme Court Rule 17.1.

The care which the state court system exercised to correctly apply the "clear and convincing evidence" standard of Santosky v. Kramer, 455 U.S. 745(1982) in this case is shown in its having been returned by the Court of Appeals for a rehearing under that standard, Matter of Michael B., 58 NY 2d 71, and after rehearing and dismissal by the Family Court, being reviewed as to the evidence by both the Appellate Division and the Court of Appeals, both of which benches unanimously found the petitioner's permanent neglect to have been clear and convincingly proved as set forth in the comprehensive findings of fact in the Appellate Division's opinion, which is

set forth in full as Appendix B of the petition for writ of certiorari.

This lack of merit to the petitioner's allegation that there is a federal question is reflected in the petitioner's failure to have raised or preserved the alleged federal question in the state courts.

2. A writ of certiorari should not be allowed, because the petitioner did not raise the alleged federal question sought to be reviewed in any of the state courts, in the rehearing or in the appeals from the rehearing, and the petition for a writ of certiorari does not state that the alleged federal question sought to be reviewed was so raised. U.S. Supreme Court Rule 21.1(h). The petitioner rightly did not see fit

to bring forward such an assertion below, and it has no more merit now when it is pushed forward only as another form of the petitioner's argument about the weight of the evidence.

3. The facts of this case overwhelmingly called for a finding of permanent neglect, terminating the petitioner's parental rights, and freeing this child for the opportunity for adoption.

The petition for a writ begins its statement incorrectly on its page 3 by alleging that the duration of foster care had been from October 1980 to December 1980, when the permanent neglect proceeding was commenced. The foster care was from October 1979 until December 1980, a period of over thirteen months, not just two months. This

appears from the Appellate Division decision, Appendix B of the petition for a writ. During nine of those thirteen months, the petitioner was away from New York State, ignoring her son and living and traveling among three different states with several different men. When she was in Broome County, New York, near her son's foster home before and after her nine-month desertion she displayed the same choice, preferring her pleasure-seeking, promiscuous drifting life, to the exclusion of her son and to the exclusion of any planning concerning him. The Appellate Division well said that the petitioner "has failed to accept the parental role." (page 4b of the petition for a writ)

It was the petitioner who on October 29, 1979, telephoned the respondent to come and get her child. No force was used in placing the child in care, as was shown by the testimony of two caseworkers. In fact, their testimony showed the contrast between the petitioner's communication and contact with her daughter and her lack of communication and contact with her son on that October 29. At that time, legal custody of her children resided in Maryland social services department by Maryland Court Order under which placement of the children with the petitioner was under the respondent's protective supervision. On November 7, 1979, the respondent filed a child neglect petition with Broome County Family Court and received from that Court a

temporary order of custody of the son. The petitioner and her attorney appeared in Family Court on November 19, 1979, in that proceeding; and on December 17, 1979, an order based upon their stipulation continued custody for a year from that December 17. No appeal was made from any part of the foregoing proceedings which culminated in the stipulated custody order.

After the petitioner failed to keep her scheduled Christmas 1979 visit with the child, the petitioner disappeared. At the rehearing one of the persons with whom the petitioner then had stayed, was asked if the petitioner said why she was going to Texas, and testified that the petitioner said she was going with Paul (her boyfriend) and they were in love.

The petitioner did not take the stand to deny this. The respondent's caseworker (Joyce Brown) testified that she had not talked with the petitioner about the psychiatric evaluation nor about custody of the daughter. The evidence that the petitioner deserted her son to go with her boyfriend was also consistent with the petitioner's conduct from that time on: the petitioner chose to live with her current boyfriends to the exclusion of any involvement with her son. The Appellate Division's opinion's recitation of the petitioner's continued moves, taking up with various men, as the respondent continued to try to find her again and work with her is fully born out by the proof. After locating her, the respond-

ent also tried to work with her through social services departments in the other states. There were no threats.

In the entire thirteen months, the petitioner visited her son only five times. The first three visits were in the first two months of custody and while the petitioner was still staying with Michael's grandmother. The last two visits were both in the last ten days of October 1980, immediately after her re-appearance in New York State. On October 21 the petitioner told the respondent that she was just visiting in New York and would leave in a day. From the evidence it appears that she was staying with Michael's grandmother. The grandmother herself was the one who picked up and returned Michael on that

Halloween. Thereafter in the entire month of November 1980 she never asked to visit Michael, despite the respondent's urging that frequent and regular visits were necessary. When the petitioner was out of her own mother's (Michael's grandmother) oversight, the petitioner made no moves whatever toward her son. She showed no interest of her own. She admitted in the first hearing that a West Virginia social services department gave her bus fare home so that she could see Michael but that instead she rode to Ohio with yet another man. While she was in Texas she received money for a birthday card for Michael, but spent the money on other things and did not send the card. She lived with different men in Texas,

West Virginia, and Ohio. In Ohio she became pregnant by a man other than the one with whom she went to Ohio. Throughout her travels, respondent tried to find where she was, then wrote to her, and communicated with the local social services department where she was.

The evidence contradicts any claim that petitioner's return to Broome County in October 1980 was to be with Michael. When she arrived, she said that it was for a couple of days and that she would go right back to Ohio. At the rehearing her boyfriend testified, revealing that she had by chance seen him at a store and thereafter moved in to stay with him, at first in his mother's apartment, where he was then staying. The petitioner did not take the stand to contradict his testimony. Just as she had de-

serted Michael in order to be with her boyfriend in January 1980, she over nine months later decided to remain back in Broome County because of her boyfriend. This did not mean that she would try to see Michael, who lived only a mile away, though. She did not try to see Michael for an entire month after Halloween.

When the petitioner was heard from on October 21, 1980, with only a day or two in which to visit Michael before leaving again, the respondent did cooperate in an immediate visit for October 22. The respondent's caseworker was just then about to begin maternity leave. When the petitioner appeared again on October 27, it was a surprise that she was still in town, and the caseworker's supervisor, who had been reviewing the

case with the caseworker over the past year, met with the petitioner. This enabled the respondent to respond promptly with the petitioner.

The supervisor gave the petitioner lengthy counsel which can only be seen as helpful and compassionate. The supervisor explained that the psychiatric evaluation (to which the mother had stipulated and which she admittedly had deliberately missed over nine months before) was necessary and was to see whether there was a need for therapy and that any therapy, if needed, would be to resolve any problem and work toward having the child back; that the petitioner should have adequate living space and adequate finances (whether a job or public assistance); and that the petitioner must have regular and frequent visitation with the child.

On November 3, 1980, the supervisor offered transportation to the evaluation and asked the petitioner to arrange an appointment with the mental health clinic and call the supervisor back in three days. The petitioner went through that November without asking for a visit. She continued in her determination not to go for an evaluation and did not telephone the supervisor until November 19, the day after the appointment for the evaluation. She decided to stop working, after an illness of only a couple of days; and she continued her informal staying on with her boyfriend in various lodgings in the building he lived in. Contrary to the petitioner's testimony at the first hearing, the landlord's agent testified at the rehearing that the petitioner did not pay rent in 1980. The petitioner

did not testify in the rehearing to contradict this.

There is no evidence that the petitioner requested that a caseworker be assigned in the supervisor's place, nor that any such request was refused. The supervisor had stepped in to help when the petitioner appeared without notice, and became involved in counseling the petitioner in the two months after the petitioner's return.

As to page 13 of the petition for a writ, the supervisor counselled the petitioner to have regular and frequent visits with the child on October 27, 1980, when the petitioner first said she would stay in Broome County. Except for the one Halloween visit where the child's grandmother picked him up, the petitioner

never sought a visit until over a month later, December 1, 1980, and then only for three weeks away. On December 2, 1980, the respondent advised the petitioner that a permanent neglect petition would be filed and that visits would be supervised.

On page 13 the petitioner admits that the petitioner chose not to heed the respondent's advice about adequate housing. She does not claim the respondent gave her conflicting advice, only that she and her counsel chose not to heed it. It is noted that an objection to her testimony about her attorney's advice was sustained and the petitioner has not questioned that ruling on appeal.

Page 14 of the petition for a writ misstates the proof concerning visitation and the petitioner's return in October 1980. The Appellate Division correctly found that a visit was hurriedly arranged to accommodate the petitioner's brief visit in Binghamton. The Appellate Division opinion does not say that Ms. Mantle was the person who arranged that visit. Ms. Mantle did, however, step in to fulfill the caseworker role for the petitioner upon the petitioner's surprise visit of October 27, 1980. The petitioner's descriptions of what Ms. Mantle told the petitioner about visitation and about a decision about a permanent neglect proceeding contradict the record. Respondent's brief has already described Ms. Mantle's counsel to the petitioner that she should have frequent and regular visitation. The discussions about supervised visitation

and permanent neglect were not in October 1980. They were in December 1980 after the petitioner had continued her drifting, pleasure-seeking life, and her determination not to cooperate about an evaluation throughout the month of November, with no request to visit the child who lived only a mile away from her.

The petition's page 15 refers to the Appellate Division's findings that the petitioner was observed at visits to be rough and aloof toward her son, and to fail to give him the affection she showed her daughter. These findings were supported by the proof. She should only have been wary of observation of the visits, if she expected not to improve.

All of the foregoing proof presents clear and convincing evidence of the peti-

tioner's unfitness as the mother of this child. The respondent's efforts were diligent in searching for the petitioner and trying to help her, throughout thirteen months. She excluded the idea of being her son's parent from her life, and chose another kind of life.

The New York Court of Appeals took great care to assure the application of the Santosky standard of proof. After the Family Court judge who had earlier held that there was "clearly" permanent neglect in the first hearing apparently and mistakenly felt foreclosed by the Court of Appeals from considering the case as a whole despite the extensive, clear and convincing proof in the rehearing, the Appellate Division and Court of Appeals

both thoroughly reviewed the evidence and correctly found, as the findings of the Appellate Division set forth, clear and convincing proof of permanent neglect.

No reason, much less special or important reason, exists for this Court to be asked to conduct an evidentiary review of this proceeding in which the state courts have arrived at a correct decision on compelling evidence after thorough and careful application of the Santosky standard of proof. United States Supreme Court Rule 17.

The petitioner, who was discredited and contradicted by witnesses that she herself knew and could have produced in the first hearing or the rehearing, neither contested respondent's new witnesses nor

raised any constitutional questions as to weight of the evidence at rehearing or appeal. The respondent submits that the case has been rightly decided by the Court of Appeals based upon thorough consideration of the overwhelming evidence presented by the respondent.

CONCLUSION

For these reasons, a Writ of Certiorari should not issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

JOHN E. MURRAY
Attorney for Respondent
Broome County Office Building
Government Plaza
Binghamton, NY 13901
(607)772-2117